As a result of the Amsterdam Treaty, the Schengen *acquis* was transferred into the framework of the European Union on 1 May 1999, in accordance with the Protocol annexed to the TEU and the TEC regulating the details of that transfer.

The Common Manual on checks at the external borders constitutes part of the Schengen *acquis* transferred to the European Union.

In this context and given the rules laid down in the Common Manual on external borders, the Portuguese Presidency intends to raise different issues relating to one of the major occurrences at the maritime borders of the European Union – the discovery of stowaways. Our ultimate goal is to harmonise border procedures for dealing with this situation.
CONTEXT

Point 3.4.3.4 of the Common Manual on checks on maritime traffic deals with the obligation on the ship’s captain to notify the border authorities in the port of destination of the presence on board of stowaways.

Immediate notification is required, if possible before the ship enters the port.

Point 3.4.3.4 also clarifies the captain’s responsibility for stowaways, who should be kept on board.

The fact that stowaways are generally illegal immigrants and that illegal immigration via the sea is now a worldwide phenomenon which targets all kinds of maritime transport, in particular pleasure boats, coastal fishing vessels, cruise liners, distant-water fishing vessels, commercial vessels, etc., identifies this as an area requiring closer examination.

1. CONCEPTS

First of all, there is an urgent need to harmonise the terminology used and the concepts inherent to the issue of stowaways.

To this end, it is crucial to begin by defining the following concepts which are not defined in the Common Manual:

"stowaway";
"international area of a port";
"sole-access area";
"restricted areas".
**Stowaway** may be interpreted as a person who: illegally boards a ship, in an attempt to be transported, unknown to and without the consent of the shipowner and the crew; is found on board when the ship has left the port; is not on the crew or passenger list; is not entitled to the same rights as the crew or the passengers and does not engage in paid activity; and who is considered a stowaway by the ship’s captain who immediately notifies the authorities.

This definition is similar to that given in the Brussels Convention of 1957 and adopted in IMO Resolution A.871 (20) of 27 November 1997.

However, it is not as easy to clarify or precisely state the status of a stowaway since, once on board a ship, he can be an asylum seeker, an illegal immigrant, or a criminal.

2. **IMMEDIATE NOTIFICATION THAT A STOWAWAY HAS BEEN FOUND ON BOARD**

The strong migratory pressure at the external maritime borders of the European Union and the fact that stowaways are often linked to illegal immigration networks means that, when a stowaway is discovered on board, makes immediate contact particularly important between the:

(a) shipowner/captain/shipping agent and the authorities in the port of destination

(b) immigration authorities and the harbour authorities in EU ports

In the situation described in (a), in accordance with the Convention on Facilitation of International Maritime Traffic of 1965, if a stowaway is discovered on the high seas, in the vicinity of the port or in the port, the ship’s captain must notify the border authority of his presence and submit a document containing all the information established on board, notably: the stowaway’s nationality; name; port of embarkation; date/time and geographical position of the ship when the discovery was made, the ship’s port of departure and ports of call, based on an indication of its route/dates of arrival/departure.
In the situation described in (b), there must be cooperation between the immigration authorities at the maritime borders of the European Union, captains, shipowners, port authorities, administrative staff and other port employees. Such cooperation is necessary to ensure port security and to prevent illegal immigration; information exchange is vital, especially between the port of departure and the port of arrival or the first port of call.

3. RESPONSIBILITY

On the subject of responsibility, point 1.4.3. of the Common Manual, under the section entitled "Procedures for refusing entry" lays down that "If an alien refused entry has been brought to the border by a carrier by air, sea or land, the authority responsible locally must order that carrier to assume responsibility for the alien without delay".

It is important to determine who is responsible for the alien when he is a stowaway, in which case the following questions arise:

(A) in which country did the stowaway board the ship?
(B) in which country did the stowaway disembark?
(C) which country’s flag is the ship flying?
(D) which country is the stowaway a national of?
(E) in which country does the stowaway reside?
(F) in which countries did the ship put in?

Who is responsible for ascertaining the stowaway’s identity, arranging his documentation and determining in which port he boarded the ship?

Point 1.4.3. of the Common Manual states that the authority responsible locally must order the alien to be transported to the Third State from which he was brought, to the Third State which issued the document authorising him to cross the border, or to any other Third State where he is guaranteed admittance.
However, when the alien is a stowaway, the following points must be considered:

- It is not always possible to establish in which Third State the stowaway boarded e.g. if discovered on the high seas (sometimes in international waters) and after the ship has called at several ports;
- Sending the stowaway back to the Third State from which he was brought, if that can be determined, means that the stowaway must be kept on board the ship for a long time (the ship may already have travelled from Africa and the stowaway will have to stay on board for some months before the ship returns to Africa - if a return journey is planned), and will pass through a number of EU ports in the meantime;
- If the stowaway has no papers, it is difficult to determine the Third State to which he is to be sent back;
- Moreover, stowaways transported on fishing vessels and pleasure boats cannot stay on board and return to the Third State where they boarded on account of the specific nature of vessel and the kind of navigation involved.

4. COSTS

The Common Manual provides that the costs of lodging, maintenance and the return journey of the alien who is refused entry may be charged to the carrier i.e. to the shipowner/shipping agent.

The ship’s captain is accountable if the border authorities have not been notified of the presence of stowaways and, since stowaways are considered his responsibility, he must ensure they stay on board.

If a stowaway disappears from the ship, it is customary in some States to require a bank guarantee from the shipowner for the costs subsequently incurred in tracking him down with a view to repatriation.
In accordance with point 1.4.3. of the Common Manual, until the alien has been returned, to prevent aliens who have already been refused entry from entering the territory illegally, they must be prohibited from going ashore in ports and kept in a detention centre.

5. SECURITY IN PORTS

Security in ports must be reassessed as a priority for external borders of the European Union.

Stowaways' access to ships raises the question of whether other individuals can bring in drugs or explosives and engage in terrorist activities. In this connection, it is important to define the concepts of international area in a port and sole-access and restricted-access areas.

As ports are large open spaces with wide jurisdiction, in addition to the entry/exit document checks on crews and passengers, it is important to ensure that effective controls are in place at the entrance to the port and that there is adequate supervision of the port area.

To this end, the border authority should get increasingly involved in the programmes relating to telematic applications, such as VTS/VTMIS or similar programmes.

Greater use should also be made of the different technology for detecting humans hidden in containers.

Maritime security should therefore be seen as a necessary and integral part of port operations.
6. SUMMARY

This note, which deals in particular with stowaways, requires clarification on the following points:

- Concepts
- Immediate notification that a stowaway has been found on board
- Responsibility
- Costs
- Security in ports.

The reason for focusing on these areas is that stowaways sometimes have to stay in a port or on board a ship for a long time, which sets their situation apart from that of air passengers refused entry in terms of the speed it can be dealt with.

Lastly, the chapter on document checks and monitoring by the border authority in ports requires us to take account of additional practical considerations related to the growing international problem of stowaways currently facing us; for this reason, Portugal has drawn up a questionnaire (annexed hereto), which, it hopes, will lead to a comprehensive analysis of the situation.
QUESTIONNAIRE

- At what point in time must the captain/shipowner/shipping agent representing the ship report that there are stowaways on board: before the ship enters the port; as it enters the port; as it moors?

- What steps are to be taken when stowaways are discovered on board ships that have already moored?

- What is the procedure when a stowaway arrives?

- Who guarantees the security and supervision of a stowaway found on board?

- What solutions have been found for repatriation?

- What are the costs for the shipowner during repatriation?

- What are the shipowner’s responsibilities if the stowaway applies for political asylum?

- Where is the stowaway kept when the asylum application is being examined?

- What steps are to be taken if a stowaway turns violent on board?

- In what circumstances is the shipowner penalised for having stowaways on board?

- What steps are taken when a stowaway stays on board and travels to another Schengen port?
• What steps are taken when a stowaway stays on board and travels to a port outside the Schengen area?

• What are the procedures and penalties if a stowaway found on board disappears?